

***BLANK PAGE***

**FILE COPY**

Office - Supreme Court, U. S.  
**FILED**

**JAN 23 1941**

**CHARLES ELMORE CROPLEY**  
CLERK

**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1940**

---

**No. 715**

---

**THE ARKANSAS CORPORATION COMMISSION AND  
FIFTY-ONE COUNTY TAX COLLECTORS OF  
ARKANSAS,**

*Petitioners,*

*vs.*

---

**GUY A. THOMPSON, AS TRUSTEE OF MISSOURI PACIFIC  
RAILROAD COMPANY, DEBTOR.**

---

**PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT.**

---

✓ **JACK HOLT,**  
*Attorney General of Arkansas;*  
✓ **LEFFEL GENTRY,**  
*Assistant Attorney General;*  
✓ **HENRY L. FITZHUGH,**  
✓ **JOSEPH M. HILL,**  
*Counsel for Petitioners.*

***BLANK PAGE***

## INDEX.

|  | Page |
|--|------|
| Petition for writ of certiorari .....                                      | 1    |
| Statement of the case .....  | 2    |
| Statement of basis of jurisdiction of this Court<br>to review decree ..... | 7    |
| Statement of the questions presented .....                                 | 8    |
| Statement of the reasons relied on for granting<br>the writ .....          | 8    |

### TABLE OF AUTHORITIES.

#### CASES CITED.

|   |       |
|---|-------|
| <i>168 Adams Bldg. Corp.</i> , 105 F. (2d) 704 .....  | 12    |
| <i>Bordens Farm Products Co. v. Baldwin</i> , 293 U. S. 194 .....   | 12    |
| <i>Bordés v. First National Bank</i> , 178 U. S. 524 .....  | 9     |
| <i>Boteler v. Ingels</i> , 308 U. S. 51 .....   | 11    |
| <i>Central Railroad Co. of New Jersey v. Martin</i> , de-<br>cided November 25, 1940, Circuit Court of Appeals<br>of the Third Circuit, not officially reported ..... | 12    |
| <i>City of Springfield v. Hotel Charles Co.</i> , 84 F. (2d)<br>589 .....   | 12    |
| <i>Clearcreek Oil &amp; Gas Co. v. Spelter Co.</i> , 151 Ark. 12 ..   | 5     |
| <i>Enelow v. N. Y. Life Ins. Co.</i> , 293 U. S. 379 .....  | 13    |
| <i>Federal Communications Commission v. Pottsville<br/>Broadcasting Co.</i> , 309 U. S. 134 .....   | 9     |
| <i>Florida National Bank v. United States</i> , 87 F. (2d)<br>896 .....   | 12    |
| <i>Gainesburg v. Dodge</i> , 193 Ark. 473 .....   | 13    |
| <i>Hennepin County v. Savage</i> , 83 F. (2d) 453 .....   | 11    |
| <i>McGregor v. Johnson-Cowdin, etc.</i> , 39 F. (2d) 574 ..   | 11    |
| <i>McLaughlin v. St. Louis &amp; Southwestern Ry.</i> , 232<br>Fed. 579 .....   | 11    |
| <i>Missouri Pacific Railroad Co. v. Conway and Vilonia<br/>Road District</i> , 280 Fed. 401 .....   | 11    |
| <i>Nashville, Chattanooga, etc. R. R. v. Browning</i> , de-<br>cided May 20, 1940, not yet officially reported, Ad-<br>vance Opinions, 84 Law Ed. 862 .....           | 9, 13 |
| <i>Palmer v. Mass.</i> , 308 U. S. 79 .....   | 9, 10 |

|  | Page |
|--|------|
| <i>Railroad Commission v. Rowan &amp; Nichols Oil Co.</i> ,<br>decided June 3, 1940, not yet officially reported,<br>Advance Opinions, 84 Law Ed. 983..... | 9    |
| <i>Robertson v. Goree</i> , 29 F. (2d) 261.....  | 11   |
| <i>Rogers v. Rogers</i> , 174 Ark. 486.....  | 12   |
| <i>Texas Co. v. Blue Way Lines</i> , 93 F. (2d) 595.....   | 12   |

## STATUTES.

|  |       |
|--|-------|
| 11 U. S. C. A., section 104.....   | 8     |
| Pope's Digest, section 2044.....   | 3     |
| Pope's Digest, sections 2019-2020.....   | 5, 6  |
| 28 U. S. C. A., section 347.....   | 7     |
| 28 U. S. C. A., section 41.....  | 8, 10 |
| Article 16, section 5 of the Constitution of Arkansas<br>Chapter IV, Section 23 (b) of the Bankruptcy Act of<br>1938 ..... | 10    |



**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1940**

---

**No. 715**

---

**THE ARKANSAS CORPORATION COMMISSION AND  
FIFTY-ONE COUNTY TAX COLLECTORS OF  
ARKANSAS,**

*vs.*

*Petitioners,*

**GUY A. THOMPSON, AS TRUSTEE OF MISSOURI PACIFIC  
RAILROAD COMPANY, DEBTOR.**

---

**PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT.**

---

*To the Honorable Charles Evans Hughes, Chief Justice of  
the United States, and the Associate Justices of the Su-  
preme Court of the United States:*

The petitioners are the members of the Arkansas Corporation Commission and the tax collectors of fifty-one counties of the State of Arkansas, and they respectfully submit the following matters:

### Summary Statement of the Case.

The Missouri Pacific Railroad Company is in bankruptcy in the District Court of the United States, Eastern Division, Eastern Judicial District of Missouri, at St. Louis, in a Corporate Reorganization Proceedings under Section 77 of the Bankruptcy Act. The Trustee, under orders of Court, operates the railroad in fifty-one (51) counties in Arkansas. On April 11, 1940, the Trustee filed in said District Court a Petition relative to the taxes for 1939, assessed against property of the Trustee in Arkansas. Mindful of the mandate for a short summary, yet it is necessary to give the structure of this petition filed by the Trustee (R. 6 to 20), since the Circuit Court of Appeals held his allegations were sufficient to give the District Court in Bankruptcy jurisdiction to determine the amount of the assessments levied against the property. Hence the bare bones thereof are summarized.

The Petition alleged that the Trustee was under order of Court authorized to pay taxes on property of the debtor for which the debtor or Trustee was obligated by law to pay; that questions had arisen with respect to the legality and amount of the general taxes assessed and levied for the year 1939 against property of the trust estate then owned and operated by the Trustee; that jurisdiction was given the Bankruptcy Court under Section 64 (a), paragraph 4, of the General Bankruptcy Act of 1938, to determine the question of legality and amount of the taxes. The Petition, however, does not correctly state the terms of said section and paragraph. The section relates only to taxes of the bankrupt prior to the bankruptcy proceeding and establishes the priority of such debts when ascertained.

The Petition alleged some of the provisions of the Arkansas Statutes for assessing railroad operating property and

for the levy and collection of taxes thereupon. They provide in substance that the power and duty of assessment be vested in a State Board designated as the Arkansas Corporation Commission which is required to consider what a clear fee simple title would sell for under usual conditions of sale of such character of property; and further to consider, in so far as other evidence and information in its possession does not make it improper or unjust to do so, the market or actual value of its outstanding capital stock and funded debt and income.

The Petition did not allege, but the Statute, Section 2044, Pope's Digest, requires the Commission to consider the estimated investment and valuation of the property as set up in the Company's books as the basis for adjustment of rates or charges for services, and such other information as to value the Commission may obtain. The Petition alleged that the value determined by the Commission was required to be certified and apportioned to the counties for the levy and collection of taxes upon such assessed valuation as are levied and collected upon property of local owners. The Petition alleged the companies were required to make returns of their property and valuation and income, etc., and that those were duly made; and that thereafter the Commission was required to assess the property. The Petition alleged that the Trustee was given notice of the impending assessment and that he appeared and protested the tentative amount thereof, and a final hearing was set for December 4, 1939, and after said hearing the final assessment was made of the Trustee's property in Arkansas in the sum of \$28,050,000; and that on December 5, distribution and apportionment was made of the amount to the several counties as required by law and that the taxes were levied in such counties in the amounts set forth in the Petition, and that warrants for the collection thereof were in



the hands of the local tax collectors at the time the Petition was filed.

The Petition alleged that this assessment was based on a system value of \$247,565,396; and that there was allocated to Arkansas 28.39411 per cent of this amount, and after said allocation to Arkansas an equalizing factor of 40% was applied thereto, resulting in the aforesaid assessment of \$28,050,000. Neither the allocation or equalization factor is assailed, and further reference to them is unnecessary.

The Petition alleged the System value was arrived at by a composite average of various factors in which 25 per cent consideration was given to the stock and bond values for a five year period preceding the assessment; 25 per cent consideration to capitalization of earnings at the rate of 6% per annum for said period; 25% consideration to reproduction cost less depreciation as found by the I. C. C.; 12½ per cent consideration to book value as carried on the books of the Railroad Company, and 12½ per cent consideration to the gross income for the five year period.

The Petition did not assail use of the stock and bond factor and the capitalization of earning factor, on the contrary alleged they were proper factors upon which to make the assessment without considering other factors, and that the consideration of those other factors, reproduction costs less depreciation, book values, and gross income, resulted in establishing an over assessment of the Trustee's property, which was discriminatory under the Arkansas Constitution, and in violation of the Due Process and Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

The Petition alleged that the use of the proper factors would have resulted in an assessment of the Trustee's property in the sum of \$16,830,000, and set up an apportionment thereof to the counties. This table showed a difference in

taxes when computed on the assessment made by the Commission and the assessment which the Trustee alleged should have been made in the amount of \$416,043.17.

The Petition failed to allege the Arkansas statutory remedy for a tax payer having such grievance as alleged by the Trustee which is provided in Sections 2019-2020 of Pope's Digest. These sections provide for an appeal from the final Order of the Commission to Pulaski Circuit Court, a Court of general jurisdiction at the seat of Government, and provide for temporary or other proper relief, pending the hearing, and for the advancement of the cause to a speedy hearing; and further provide for an appeal to the Supreme Court by an aggrieved party with like requirements for advancement of the cause upon the docket. The Supreme Court of Arkansas has held this to be a judicial review of the action of an administrative body. *Clearcreek Oil & Gas Co. v. Spelter Co.*, 161 Ark. 12. Instead of pursuing this remedy the Trustee prayed in his Petition that he be authorized to pay the taxes which he set up therein should be paid, and that he be authorized to refrain from paying to the collectors the taxes which he disputed, amounting to \$416,043.17, until the court heard and determined the amount and legality thereof. Upon the filing of the Petition the Court ordered the Trustee to pay the taxes to the collectors according to the prayer of the Trustee in his Petition, and "to withhold and refrain from paying the collectors of said respective counties, any additional taxes for the year 1939, based on the assessment heretofore made upon the properties of the Trustee in said State by the Corporation Commission of the State of Arkansas, pending determination by this Court of the amount and legality of the taxes assessed against the property of the Trustee in said respective counties for the year 1939" (R. 25).

The Petition was set for hearing at a date certain, and notice of the same and a copy of the aforesaid order was

directed to be sent to the Attorney General of Arkansas, the Corporation Commission of Arkansas, and the Fifty-one County Collectors holding the warrants for the collection of the taxes (R. 21). The Attorney General, the Corporation Commission and the fifty-one Collectors filed a Petition to Dissolve the Injunction and Dismiss the Petition (R. 25-34), upon the following grounds:

- (1) That the assessment was an Order of a Board of the State where reasonable notice was given and full hearing had and where a plain, speedy and efficient remedy was available to the Petitioner for the matters and things alleged in said petition, which remedy was provided in Sections 2019-2020, Pope's Digest.
- (2) That the assessment made by the Corporation Commission was the basis for a tax imposed by and pursuant to the laws of the State, and taxes accruing in each county as set forth in the petition were taxes imposed by the laws of the State; and similar allegations were made as to the plain, speedy and efficient remedy provided by the Statutes of Arkansas.
- (3) That the petition was based on an assumed authority given the District Court in Bankruptcy, under Section 64a of the Bankruptcy Act of 1938, and the Commission alleged said provision established priority in debts of a bankrupt estate in liquidation, and if applicable to taxes cceedings under Section 77, was only applicable to taxes due by the bankrupt estate prior to bankruptcy, and not to taxes accruing during the operation of the property by the Trustee under the order of the Bankruptcy Court. The Commission further alleged that under Chapter IV, Section 23b of the Bankruptcy Act of 1938, the Trustee could only prosecute his suit in a court where the bankrupt could have done so had not bankruptcy intervened.



(4) The Commission alleged that Section 64a of the Bankruptcy Act was inconsistent with the preceding Section 77a and was not applicable to proceeding under Section 77.

(5) The fifth point was not pressed in the court below and the sixth point now becomes the fifth, and is that the petition did not present a justifiable controversy. The petition showed that the attack on the assessment raised purely an administrative question as to the proper weight to be attached to various recognized factors, and did not raise a question for court review.

For each of the aforesaid reasons the Commission prayed that the injunction against the collection of the taxes on the property of the Trustee be dissolved and the petition of the Trustee be dismissed.

The District Court overruled said motion, holding it had jurisdiction under 64a, notwithstanding the appeal was not taken to the courts in Arkansas, which right was given to the Trustee by the Arkansas Statutes (R. 39). These petitioners appealed to the Circuit Court of Appeals and it affirmed the decision of the District Court.

**Statement of Basis of Jurisdiction of This Court to Review  
the Decree of the Court Below.**

The statutory provision which is believed to sustain the jurisdiction of this Court is Section 240 of the Judicial Code (28 U. S. C. A., Section 347).

The date of the decree to be reviewed is January 3, 1941; and the opinion of the Circuit Court of Appeals pursuant to which said decree was entered on said date is attached to the printed record to be furnished with this application for writ of certiorari.



### Statement of the Questions Presented.

(1) Whether the power conferred on courts of bankruptcy by Section 64a (11 U. S. C. A. 104) applies only to taxes which are "due and owing by the bankrupt," or whether such power also applies to taxes which accrue during the pendency of the proceedings which are payable as a part of the expense of administering the estate.

(2) Whether Section 64a (11 U. S. C. A. 104) is a part of Section 77 so as to be applicable to a railroad reorganization proceeding.

(3) Whether Section 24 of the Judicial Code as amended (28 U. S. C. A. 41) denying to district courts jurisdiction of any suit to enjoin, suspend or restrain the enforcement of any order of State administrative board, and denying to district courts jurisdiction of any suit to enjoin or restrain the assessment, levy or collection of any tax imposed by the laws of any State, where a plain, speedy and efficient remedy may be had in the courts of such State, is applicable to a district court acting under Section 77 of the Bankruptcy Act in the matter of a railroad reorganization proceeding.

(4) The petition of the Trustee in the district court showed on its face a non-justiciable controversy in that it presents questions delegated exclusively to an administrative body.

### Statement of Reasons Relied on for the Allowance of the Writ.

#### 1.

The decision of the Circuit Court of Appeals is upon important questions of Federal law, none of which has

been directly passed upon by this Court. The questions are frequent in railroad reorganization proceedings and the decision of this Court on these questions is important in order that consummation of the proceedings shall not be further delayed and that the relative rights of the States and the bankruptcy courts in regard to taxation be determined.

## 2.

The decision of the court below is in conflict with principles established by prior decisions of this Court.

The gravity and scope of the decision is indicated by the following statement in the opinion of the court below:

"We did not reach our conclusion without full appreciation of the very great burden of responsibility that Section 64a may impose upon the bankruptcy court in railroad reorganization proceedings, and we are not unmindful that during the period of railroad reorganization the several states through which the debtor railroads run may be temporarily restricted in the exercise of their general and customary sovereign powers in respect to the collection of taxes assessed against property within their borders."

The cases referred to which in principle are contrary to the decision herein are: *Palmer v. Mass.*, 308 U. S. 79; *Federal Communications Commission v. Pottsville Broadcasting Company*, 309 U. S. 134; *Nashville, Chattanooga, etc., R. R. v. Browning*, decided May 20, 1940, not yet officially reported, *Advance Opinions*, 310 U. S. 362; *Railroad Commission v. Rowan & Nichols Oil Company*, decided June 3, 1940, not yet officially reported, *Advance Opinions*, 310 U. S. 573.

This decision is also in conflict in principle with *Bordes v. First National Bank*, 178 U. S. 524, construing what is now Chapter IV, Section 23b, of the Bankruptcy Act which

requires the Trustee to bring suit only in such courts which the bankrupt could have sued if bankruptcy proceedings had not been instituted.

## 3.

It is submitted that this decision has so far departed from the accepted and usual course of judicial proceedings, and has sanctioned such a departure by the district court, as to call for an exercise of this Court's power of supervision.

The effect of this decision rendered inapplicable to district courts sitting in bankruptcy (in Section 77 proceedings) the following Acts of Congress: (a) The Johnson Act of 1934, and (b) the Tax Act of 1937, which are amendments to Section 24 of the Judicial Code and are now compiled in U. S. C. A., Title 28, Section 41. The first of these forbids the District Courts issuing injunctions against orders of State Boards where the State courts afford plain, speedy and efficient remedies, and the second one forbids injunctions against the assessment, levy or collection of taxes imposed by the laws of the State, where the State affords such plain, speedy and efficient remedies; and (c) Chapter IV, Section 23b of the Bankruptcy Act requiring the trustee to bring suit only where the bankrupt could have sued.

In note 17, appended to *Palmer v. Mass.*, 308 U. S. 79, is this statement:

"Congress did not intend that those who operate a business under the control of a federal court should be immune from the regulatory authority of the several states any more than they are from their taxing power."

This decision is also subversive of a sound principle which has been stated and applied by the Eighth Circuit Court of Appeals, heretofore, to-wit:



“When a state provides a tribunal for the hearing of complaints against assessment, such tribunal has exclusive jurisdiction.”

*McLaughlin v. St. Louis & Southwestern Ry.*, 232 Fed. 579;

*Missouri Pacific Railroad Company v. Conway and Vilonia Road District*, 280 Fed. 401.

This decision is in conflict with decisions of other Circuit Courts of Appeal on the same matter. This opinion holds 64a is applicable to taxes levied against the trustee and is not confined to taxes due by the bankrupt prior to bankruptcy proceedings. The following decisions hereinafter referred to were rendered under 77b, which, in this respect, differs from 77 only that in the former there is a provision that if and when corporate reorganization fails and liquidation is ordered then 64a becomes applicable, whereas under 77 there can never be liquidation as dismissal is required when reorganization fails.

The Circuit Court of Appeals of the Fifth Circuit in *Robertson v. Goree*, 29 F. (2d) 261, and the Second Circuit Court of Appeals in *McGregor v. Johnson-Cowdin, etc.*, 39 F. (2d) 574, each held that the trustee's taxes were included in the necessary cost of preserving the estate, subsequent to filing the petition and were not the taxes of the bankrupt which were controlled by 64a. The Circuit Court of Appeals of the Eighth Circuit in *Hennepin County v. Savage*, 83 F. (2d) 453, held these decisions reasonable and followed and applied them until this decision, when they now take the opposite view thereof. (The decision of this Court in *Boteler v. Ingels*, 308 U. S. 51, which distinguishes between tax penalties of the bankrupt and tax penalties of the trustee, indicates that the former decision and not the present one of the said Court of Appeals of the Eighth Circuit was the correct one.)



The opinion of the court below holds that 64a is a part of Section 77, while the Circuit Courts of Appeals of the First, Fifth and Seventh Circuits have held, in cases arising in 77b which so far as this point is concerned is analogous with Section 77, that 64a is inconsistent with other provisions of the Section and hence 64a could not be applicable thereto. The decisions so holding are as follows:

*Texas Co. v. Blue Way Lines*, 93 F. (2d) 595, Circuit Court of Appeals of the First Circuit; *City of Springfield v. Hotel Charles Co.*, 84 F. (2d) 589, Circuit Court of Appeals of the First Circuit; *Florida National Bank v. United States*, 87 F. (2d) 896, Circuit Court of Appeals of the Fifth Circuit; *168 Adams Bldg. Corp.*, 105 F. (2d) 704, Circuit Court of Appeals of the Seventh Circuit.

The decision of the Circuit Court of Appeals of the Third Circuit, rendered November 25, 1940, in *Central Railroad Company of New Jersey v. Martin*, not officially reported, while arising differently, is in conflict with the essentials of this decision, whose review we are now asking.

##### 5.

This opinion decides important questions of local law in a way conflicting with local applicable decisions. The opinion states that the petition alleged "That the assessment was wrongfully discriminatory against the Trustee in favor of other property in Arkansas, in violation of Section 5, Article 16, of the Constitution of Arkansas" (R. 18). This is a mere general statement without alleging any specific facts constituting the discrimination and is not sufficient to sustain a charge of discrimination and it is a mere conclusion of law. *Rogers v. Rogers*, 174 Ark. 486.

The soundness of this proposition is declared by similar decisions of this Court. See *Bordens Farm Products Co. v. Baldwin*, 293 U. S. 194. However, it is purely a question of

the Arkansas law as to what would be a good cause of action charging a violation of a provision of the Arkansas Constitution. The only other ground for relief in the trustee's petition was the alleged violation of the due process clause of the Fourteenth Amendment and that is rendered untenable by *Nashville, Chattanooga, etc., R. R. Co. v. Browning*, decided May 20, 1940, not officially reported, Advance Opinions, 310 U. S. 362.

Again the opinion in this case holds that the order directing the trustee to withhold and refrain from paying the disputed taxes, which it was his duty to pay unless the court relieved him by an injunctive order from so doing, was not an injunction. The Supreme Court of Arkansas in *Gainesburg v. Dodge*, 193 Ark. 473, defined an injunction differently from the court below. The Court's view that this order was not an injunction is certainly unsound if the Arkansas rule is applied, and equally so if the Federal rule is applied, which is announced in *Enelow v. N. Y. Life Ins. Co.*, 293 U. S. 379.

For each of these reasons it is respectfully prayed that the writ of certiorari be granted.

JACK HOLT,  
*Attorney General of Arkansas;*  
 LEFFEL GENTRY,  
*Assistant Attorney General;*  
 HENRY L. FITZHUGH,  
 JOSEPH M. HILL,  
*Counsel for Petitioners.*